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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 626

LOUIS FIANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statute Involved	3
Summary Statement of Facts	3
Reason for Granting the Writ	5
I. The indictment fails to state an offense against the laws of the United States	5
Conclusion	10
Appendix A—Pertinent statutory provisions	A-1
Appendix B—Opinion of the Court of Appeals,	B-1–B-5
Appendix C—Judgment of the Court of Appeals	C-1
Appendix D—Judgment and Commitment of the District Court	D-1–D-2
Appendix E—The Indictment	E-1

TABLE OF CASES CITED

Blitz v. *United States*, 153 U. S. 308 (1894)	8
Brown v. *United States*, 222 F. 2d 293 (9th Cir. 1955)	8
Cochran and Sayre v. *United States*, 157 U. S. 286 (1895)	6
Ferrari v. *United States*, 169 F. 2d 353 (9th Cir. 1948)	8

PAGE

Fiddelke v. *United States*, 47 F. 2d 751 (9th Cir. 1931) 8

Foster v. *United States*, 11 F. 2d 100 (9th Cir. 1926) 8

Hagner v. *United States*, 285 U. S. 427 (1931) .. 6

Hotch v. *United States*, 208 F. 2d 244 (9th Cir. 1953) 10

Ipoumatsa Ukichi v. *United States*, 281 F. 525 (9th Cir. 1922), cert. denied 260 U. S. 729 .. 8

Ledbetter v. *United States*, 170 U. S. 606 (1897) 6

Lee Tung v. *United States*, 7 F. 2d 111 (9th Cir. 1925) 8

Parmagini v. *United States*, 42 F. 2d 721 (9th Cir. 1930), cert. denied 283 U. S. 818 8

Poi Wing Quong v. *United States*, 111 F. 2d 751 (9th Cir. 1940) 8

Robinson v. *United States*, 263 F. 2d 911 (10th Cir. 1959) 8, 10

Rodriquez v. *United States*, 218 F. 2d 810 (5th Cir. 1955) 8

Sutton v. *United States*, 157 F. 2d 661 (5th Cir. 1946) 7

The Schooner Hoppet v. *United States*, 7 Cranch 389 (1813) 6, 7, 9

Torres Martinez v. *United States*, 220 F. 2d 740 (1st Cir. 1955) 8

United States v. *Bruno*, 144 F. Supp. 593 (1955) 8

United States v. *Calhoun*, 257 F. 2d 673 (7th Cir. 1958) 8, 10

United States v. *Carll*, 105 U. S. 611 (1881) 6

United States v. *Cook*, 84 U. S. 168 (1872) 6

PAGE

United States v. *Cruikshank, et al.*, 92 U. S. 542 (1875) 6

United States v. *Debrow*, 346 U. S. 374 (1953) .. 5

United States v. *Hess*, 124 U. S. 483 (1887) 6, 7

United States v. *Manuszak*, 234 F. 2d 421 (3rd Cir. 1956) 6

United States v. *Smith*, 232 F. 2d 570 (3rd Cir. 1956) 5

Wong Lung Sing v. *United States*, 3 F. 2d 780 (9th Cir. 1925) 8

Statutes Cited

21 U. S. C., Section 174 ..... 2, 3, 7, 8, 9

28 U. S. C., Section 1254(1) 2

Other Authorities Cited

Rules of the United States Supreme Court, Rule 19(1)(b) 5

Federal Rules of Criminal Procedure:

Rule 7(c) 5

Rule 12(b)(2) 10

Appendix of Forms 7

IN THE

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OCTOBER TERM, 1959

No.

LOUIS FIANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Louis Fiano, respectfully requests that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit which affirmed the judgment and commitment of the United States District Court for the Southern District of California.

The judgment and commitment of the District Court adjudged the petitioner guilty as charged and convicted, and further committed petitioner to the custody of the Attorney General for imprisonment for a period of twenty (20) years, and to pay a fine of $20,000.

Opinion Below

The opinion of the Court of Appeals is not yet officially reported but is printed in Appendix B to this petition.

The District Court rendered no opinion but the judgment and commitment of the District Court is printed in Appendix D to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on October 22, 1959, and is printed in Appendix C to this petition.

A petition for rehearing was filed in the Court of Appeals on November 16, 1959. An order denying said petition for rehearing was entered on December 7, 1959.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

Did not the Court of Appeals err in deciding that an indictment brought under Title 21, United States Code, Section 174, charged an offense against the laws of the United States despite its failure to allege that defendant knew that a narcotic drug had been imported into the United States *contrary to law*?

Statute Involved

Pertinent statutory provisions are printed in Appendix A to this petition as follows:

21 U. S. C. 174.

Summary Statement of Facts

Louis Fiano was indicted, convicted, sentenced to 20 years imprisonment, and fined $20,000 for a violation of 21 U. S. C. 174.

Although not essential to the point of law relied on as the reason for granting the writ sought herein, the important facts of the case are set forth below for the guidance of the Court.

During March, 1958, Federal Narcotics Agent Stephen F. Giorgio, using the assumed name Louis Di Stephano, became acquainted with Louis Fiano in Lucy's Restaurant, Los Angeles, California, where Fiano was employed as manager (R pp. 48, 54).* On several other occasions during that month, Giorgio again came to Lucy's where he spoke with Fiano (R pp. 49-50).

Giorgio testified that in the course of conversation Fiano agreed to sell him 17 ounces of heroin for $7500. Further, Giorgio stated that he paid Fiano the money in Lucy's on April 2, 1958, and was told by Fiano that he, Giorgio, would be notified when the narcotics were available (R pp. 70-73).

* References to the Transcript of Record are designated "R".

A telephone call was allegedly received by Giorgio at his home on the morning of April 7, 1958, directing him to come to Lucy's (R p. 74). Upon his arrival at Lucy's at 10:30 A.M. on that day, Giorgio parked his car in the restaurant lot, saw Fiano outside, and entered the restaurant with him (R pp. 75-76).

While in the restaurant, Fiano allegedly indicated that the narcotics would be placed under the seat of Giorgio's car (R pp. 77-78). Fiano then left Giorgio for approximately fifteen minutes (R p. 78). Upon returning, Fiano allegedly told Giorgio that the narcotics were in the car (R p. 79).

Giorgio left the restaurant about 11:20 A.M., drove to his apartment, and allegedly discovered the package in the car (R p. 80).

Despite the presence of numerous government agents in the immediate vicinity of the parking lot, none saw Fiano or anyone else approach the car (R pp. 127, 149, 158, 267). Despite the fact that a car full of agents followed Giorgio after he drove from the lot, none was present when he discovered the package (R pp. 81, 120-121).

Fiano testified at the trial and denied each and every portion of Giorgio's testimony that was remotely incriminating. This, of course, included a denial that any money was received by him and that any narcotics were transferred. Indeed, Fiano agreed only that in his capacity as manager of the restaurant he knew Giorgio, under the name Di Stephano, as a patron of the restaurant.

Fiano; a first offender, was dealt both the maximum prison sentence and fine provided by law. This, in spite of the fact that the Government case rested entirely on the uncorroborated testimony of Giorgio, coupled with the presence of most unbelievable investigative techniques.

After the conviction was affirmed by the Court of Appeals, a petition for rehearing was filed, attacking the sufficiency of the indictment for the first time. A rehearing was denied.

Reason for Granting the Writ

I

The Indictment Fails to Charge an Offense Against the Laws of the United States

This case should be reviewed because the Court of Appeals "has decided a federal question in a way in conflict with applicable decisions of this court" and has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision". (Rule 19 (1)(b) of this Court)

There is no doubt that Rule 7 (c) of the Federal Rules of Criminal Procedure requires that an indictment set forth all of the elements of the offense charged therein.[1] *United States* v. *Debrow*, 346 U. S. 374, 376 (1953); *United States* v. *Smith*, 232 F. 2d

[1] Rule 7(c) provides in pertinent part as follows: "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

570, 572 (3rd Cir. 1956).[2] This indictment fails to charge one element of the offense, namely, that the defendant knew that the narcotics had been imported into the United States "*contrary to law*", as is plainly required by the statute. (The statute and the indictment are set forth in Appendices A and E, respectively, to this petition). Instead, the words of the statute are replaced with a mere citation of the statute itself.

The form of the charge filed herein was specifically disapproved by this Court as early as 1813 in the case of *The Schooner Hoppet and Cargo* v. *United States*, 7 Cranch 389;[3] Mr. Chief Justice Marshall stated therein,

> "It is not controverted, that in all proceedings in courts of common law, either against the person or the thing, for penalties or forfeitures, the allegation that the act charged was committed in violation of law, or of the provisions of a particular statute will not justify condemnation, unless, independently of this allegation, a case be stated, which shows that the law has been violated. *The reference to the statute may direct the attention of the court, and of the accused; to the particular statute by which the prosecution is to be sustained; but forms no part of the description of the offence.*

[2] See also *United States* v. *Cook*, 84 U. S. 168, 174 (1872); *United States* v. *Cruikshank, et al.*, 92 U. S. 542, 558 (1875); *United States* v. *Crull*, 105 U. S. 611 (1881); *United States* v. *Hess*, 124 U. S. 483 (1887); *Cochran and Sage* v. *United States*, 157 U. S. 286, 290 (1895); *Ledbetter* v. *United States*, 170 U. S. 606, 610 (1897); *Horner* v. *United States*, 285 U. S. 427, 431 (1931); *United States* v. *Manzella*, 231 F. 2d 421 (3rd Cir. 1956).

[3] Although the *Hoppet* case concerned a libel of forfeiture against a vessel and its cargo, the reasoning of the Court is even more applicable when a man's liberty is at issue.

> The importance of this principle to a fair administration of justice, to that certainty introduced and demanded by the free genius of our institutions in all prosecutions for offences against the laws, is too apparent to require elucidation, and the principle itself is too familiar not to suggest itself to every gentleman of the profession." (Italics added)

The rule of the *Hoppt* case was restated and applied in *Sutton v. United States*, 157 F. 2d 661, 664 (5th Cir. 1946). The hypothesis has never been questioned that reference in a charge to the statute on which it is based forms no part of that charge.[4] Applying the rule here dictates a determination that an element of the offense was not charged, thereby rendering the indictment fatally defective.

The indictment charges that the narcotics had been imported contrary to "*United States Code, Title 21, Section 174*". Section 174 does not declare the importation of narcotics to be contrary to law. Indeed, that section itself uses the words "contrary to law", without definition, thereby requiring one to look elsewhere for a declaration as to the propriety of importing narcotics. Even assuming that the citation is considered a part of the indictment, the standard set by this Court regarding the certainty required in an indictment has not been met. In *United States v. Hess*, 124 U. S. 483, 486 (1887), Mr. Justice Field stated,

"No essential element of the crime can be omitted

---

[4] In none of the ten indictments set forth in the Appendix of Forms to the Federal Rules of Criminal Procedure does a reference to the statute appear in the body of the indictment in place of allegations. 18 U. S. C. Federal Rules of Criminal Procedure, Appendix of Forms.

> without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially, or by way of recital."[5]

To ascertain his alleged offense, not only is petitioner forced to refer to the statute on which the indictment is based, but from there he is further referred to an unspecified provision of the laws of the United States. Although the strict rules of criminal pleading have been relaxed over the years, no dispensation has ever gone this far. Indeed, should this indictment be upheld, the way is then clear for the Government to allege in an indictment only the name of the defendant, the date and place of the offense, and a citation of the statute involved.

Numerous opinions have been rendered regarding the sufficiency of indictments under 21 U. S. C. 174. These indictments have uniformly used the words "contrary to law" as contained in the statute.[6] Never, to petitioner's knowledge, has an indictment drawn in the language of the one at bar been upheld by this or any other Court.

[5] See also *Bilis* v. *United States*, 153 U. S. 308, 315 (1894); *United States* v. *Briggs*, 144 F. Supp. 593, 595 (1955).

[6] E. g. *Flores Martinez* v. *United States*, 220 F. 2d 740 (1st Cir. 1955); *Rodriquez* v. *United States*, 218 F. 2d 810 (5th Cir. 1955); *United States* v. *Calhoun*, 257 F. 2d 673 (7th Cir. 1958); *Brown* v. *United States*, 222 F. 2d 293 (9th Cir. 1955); *Ferrari* v. *United States*, 169 F. 2d 353 (9th Cir. 1948); *Pon Wing Quong* v. *United States*, 111 F. 2d 751 (9th Cir. 1940); *Faddella* v. *United States*, 47 F. 2d 751 (9th Cir. 1931); *Parmagini* v. *United States*, 42 F. 2d 721 (9th Cir. 1930); *Foster* v. *United States*, 11 F. 2d 100 (9th Cir. 1926); *Lee Tung* v. *United States*, 7 F. 2d 111 (9th Cir. 1925); *Wong Lung Sing* v. *United States*, 3 F. 2d 780 (9th Cir. 1925); *Iponmatsu Ukichi* v. *United States*, 281 F. 525 (9th Cir. 1922); *Robinson* v. *United States*, 263 F. 2d 911 (10th Cir. 1959).

In addition, petitioner was adjudged guilty of and sentenced for a crime not alleged in the indictment. The judgment and commitment signed by the trial judge recites that the narcotic drug

> ". . . had been imported into the United States *contrary to law*, in violation of 21 U. S. C. 174, as charged, in the indictment herein. . . ." (Italics added)[7]

The indictment said no such thing, although the trial judge obviously believed otherwise. The prevention of this situation is one of the prime reasons for informing an accused, through the indictment, of all of the elements of his purported offense. *The Schooner Hoppet and Cargo v. United States*, *supra*. To first inform him in the same document that imprisons him is to violate a basic concept of justice and fair play.

Petitioner recognizes that proof of knowledge of unlawful importation is rarely in issue at trial, since the presumption contained in the statute effectively frees the Government of this burden. But this presumption does not relieve the Government of its duty to file an indictment properly charging all of the essential elements of the offense. The sufficiency of the indictment and the means of proving its allegations are obviously two unrelated questions. In commenting on this relationship, Mr. Chief Justice Marshall, in the *Hoppet* case, *supra*, stated:

> "Is it cured by any evidence showing that, in point of fact, the vessel and cargo are liable to

[7] The judgment and commitment of the District Court is set forth in Appendix D to this petition.

forfeiture? The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observances is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced."[8]

The point relied on herein was timely raised below. Rule 12(b)(2) of the Federal Rules of Criminal Procedure states insofar as is applicable,

". . . the failure of the indictment . . . to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

The Court of Appeals for the Ninth Circuit held in *Hotch* v. *United States*, 208 F. 2d 244, 250 (1953), that this point could be raised for the first time on a petition for rehearing.

Conclusion

The citation of the statute in the body of the indictment constitutes no part of that indictment. Assuming the contrary, there was still no allegation that the narcotics were imported "contrary to law", as re-

[8] The Court should be reminded at this point of the weakness of the Government's cases at trial and the severity of the sentence imposed. In connection herewith the Court's attention is directed to the two recent narcotics cases of *Robinson* v. *United States*, 263 F. 2d 911 (10th Cir. 1959) and *United States* v. *Calhoun*, 257 F. 2d 673 (7th Cir. 1958). In both cases convictions were reversed due to a flaw in the indictment despite overwhelming evidence of guilt in the *Calhoun* case and apparently strong evidence in the *Robinson* case.

quired by the statute. Failure to allege this fact is clearly failure to allege an element of the offense, thereby rendering the indictment fatally defective.

The Court of Appeals has decided an important issue of federal law in a way in conflict with the decisions of this Court and has greatly departed from the accepted and usual course of judicial proceedings. We submit that the writ should be granted.

Respectfully submitted,

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Of Counsel

December 30, 1959

APPENDIX A

The Statute

Title 21, United States Code:

Section 174. Same; penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense . . . the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

APPENDIX B

Opinion of Court of Appeals

(331)*

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 16,176

Oct. 22, 1959

LOUIS FIANO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of California
Central Division

Before: STEPHENS, MARIS and BARNES, Circuit Judges
STEPHENS, Circuit Judge

Louis Fiano, whose family name is Louis Friedman, was convicted in the United States District Court of violating the Federal Narcotics Act (Title 21 U. S. C. A. §174). The conviction is based upon an indictment charging Fiano with knowingly and unlawfully selling and facilitating the sale of heroin to Stephen F. Giorgio, a government under-cover agent. The agent was operating under the assumed

* Page numbering appearing at foot of page of original Certified Transcript of Record.

name of Louis Di Stéphano. Fiano is appealing from the conviction and judgment.

The agent and Fiano became acquainted in a Los Angeles restaurant called "Lucy's", where Fiano was an employee in charge of a part of the restaurant. It is agreed that the two met in the establishment many times and the government claimed through the agent's testimony, which was denied by Fiano, that they talked in a guarded and round-about manner and later more directly about a deal between them wherein the agent agreed to buy and Fiano agreed to sell the agent a comparatively large amount of heroin for the sum of Seventy-Five Hundred Dollars ($7500.00). That later the sum was delivered by the agent to (332) Fiano who told the agent that the heroin would be delivered later. According to the agent, in due time Fiano telephoned a cryptic message to him to go to Lucy's. There, still according to the agent, the two met and the following took place:

Fiano said that his people would use the agent's car for a few minutes. The car was parked in the restaurant parking lot. The agent said, "You will need the keys," and Fiano said he would not need them. At this time, two of the agent's assistants were stationed in hiding places on the lot. One of the assistants testified that he saw the agent and Fiano come from the back of the restaurant and Fiano walked toward agent's car. He was in such a position that he lost sight of Fiano for about two minutes. Fiano then rejoined the agent.

At this point the agent testified that Fiano told him the heroin was under the driver's seat of his car. The car was not taken from the parking place where the agent had left it. The agent then drove his car to his apartment where he discovered a package under

the seat and that the package contained heroin. The arrest and indictment followed. We hold that the evidence supported the verdict of guilty.

One of the points on appeal relates to a ruling by the trial court refusing to admit two documents into evidence tendered by the defense, upon the ground that it had not been established that the witness, who had the documents in his immediate possession, had been shown to be their legal custodian, or that the documents were records regularly kept by a Las Vegas hotel. It was claimed by the defense that one of the documents was a hotel bill and the other was a hotel registration card. Each, it was claimed, indicated that Fiano was in Nevada on the very day the alleged agreement as to the sale and purchase of the heroin was made. The point involves the application of the Federal Business Records Act, 28 U. S. C. A. 1732, and we quote the essential portions thereof:

> [Business records shall be admissible in evidence] . . . if made in regular course of any business, and if it was the regular course of such business to make such a memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter.
>
> (3333)
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

Charles Blackburn was called as a witness by defendant-appellant and testified on voir dire.

The court ruled that the hotel clerk's testimony on voir dire was not sufficient to establish that the proffered exhibits were entitled to come into evidence. Whether this was error, we need not decide, since upon the ruling the defendant went no further except to withdraw the tender and made no offer of proof.

There is a long standing rule that where evidence has been offered and rejected by the trial court, the correctness of the ruling cannot be questioned on appeal unless offer of proof has been made in the trial court. As that Nestor of the Eighth Circuit Court of Appeals, Judge Gardner said in *Cropper* v. *Titanium*, 47 F. 2d 1038, 1042, "The rule requiring a party who seeks to review the ruling of a court on rejection of testimony to make a proffer of proof is not a mere arbitrary technical rule, but a practical one, very essential to the orderly administration of justice."

Closely akin to the point we have just discussed is appellant's second point that the trial court erred in the admission of testimony. The answer is that the testimony complained of was not objected to. As the government says in its brief:

> "Apparently appellant saw nothing harmful in such evidence at the time of trial. He cannot now complain, when he gave the trial court no opportunity to rule on the admissibility of those matters he now claims prejudiced his cause. As was succinctly stated by the court in United States v. De Marie, 226 F. 2d 783, 788 (7th Cir., 1955):
>
> '. . . in absence of a valid objection made at the proper time, a party may not on appeal claim that the introduction of such evidence was error.'
>
> Cf. Anthony v. United States, 256 F. 2d 50 (9th Cir., 1958)."

(334)

This point like several other points that follow have no substantial merit.

Judgment affirmed.

(Endorsed:) Opinion. Filed Oct. 22, 1959.

Paul P. O'Brien, Clerk.

APPENDIX C

(335)*

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 16,176

LOUIS FIANO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and entered: October 22, 1959
PAUL P. O'BRIEN, Clerk

* Page numbering appearing at foot of page of original Certified Transcript of Record.

APPENDIX D

Judgment and Commitment

(19)*

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

No. 26,818—CR.

UNITED STATES OF AMERICA,

vs.

LOUIS FIANO, (True name, Louis Friedman.)
Age 44

---

1 Ct.

On this 28th day of July, 1958, came the attorney for the government and the defendant appeared in person and by his counsel, John H. Marshall.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty, of the offense of knowingly and unlawfully selling and facilitating the sale of 17 ounces, 150 grains of heroin, a narcotic drug, which defendant then and there well knew had been imported into the United States contrary to law, in violation of 21 U. S. C. 174, as charged the Indictment herein, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no

* Page numbering appearing at foot of page of original Certified Transcript of Record

sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his (20) authorized representative for imprisonment for a period of twenty (20) years, and to pay a fine of $20,000.00.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ PEIRSON M. HALL,
United States District Judge.

[Endorsed]: Filed July 28, 1958. [37]

APPENDIX E

Indictment

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

No. 26818-CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS FIANO,

Defendant.

[U. S. C., Title 21, Sec. 174—Illegal sale of narcotics]

The grand jury charges:

On or about April 7, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Louis Fiano knowingly and unlawfully sold and facilitated the sale to Stephen F. Giorgio of 17 ounces, 150 grains of heroin, a narcotic drug, which, as the defendant then and there well knew, had been imported into the United States of America contrary to United States Code, Title 21, Section 174.

A True Bill.

s [Indistinguishable],
Foreman.

s LAUGHLIN E. WATERS,
United States Attorney.

[Endorsed]: Filed May 14, 1958. [2*]

* Page numbering appearing at foot of page of original Certified Transcript of Record.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

LOUIS FIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	3
Conclusion	5

CITATIONS

Cases:

Hagner v. *United States*, 285 U.S. 427 4

Statutes:

21 U.S.C. 173 ..... 2, 4
21 U.S.C. 174 ..... 2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 626

LOUIS FIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 271 F.2d 883.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1959 (Pet. App. C). A petition for rehearing was denied on December 7, 1959. The petition for a writ of certiorari was filed on January 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The opinion on a motion for bail is reported at 259 F. 2d 135.

QUESTION PRESENTED

Whether the indictment, which charged that petitioner had unlawfully sold heroin, a narcotic drug which petitioner knew had been imported into the United States contrary to 21 U.S.C. 174, was subject to attack after affirmance of the conviction on the ground that it failed specifically to state that petitioner knew that the drug had been imported "contrary to law."

STATUTES INVOLVED

21 U.S.C. 173, provides in part:

> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. * * *

21 U.S.C. 174, provides in part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or

> brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. * * *

STATEMENT

In the District Court, petitioner was convicted of a violation of 21 U.S.C. 174 by selling and facilitating the sale of 17 ounces, 150 grains of heroin. He was sentenced to imprisonment for 20 years and fined $20,000. On appeal, the conviction was affirmed.

Thereafter, in a petition for rehearing, petitioner for the first time challenged the validity of the indictment for failure to specify that petitioner knew the narcotics had been imported contrary to law. The petition for rehearing was denied.

ARGUMENT

The sole issue which petitioner raises is the validity of the indictment, which he challenged for the first time by a petition for rehearing in the court of appeals.

The indictment charged in pertinent part (Pet. App. E.) that petitioner

> knowingly and unlawfully sold and facilitated the sale to Stephen F. Giorgio of 17 ounces, 150 grains of heroin, a narcotic drug, which, as the defendant then and there well knew, had been imported into the United States of America con-

trary to United States Code, Title 21, Section 174.

Petitioner argues that the indictment is fatally defective, so as to be subject to attack even after his conviction has been affirmed, because it fails to state that he knew the drug had been imported contrary to law. He argues that the allegation "contrary to United States Code, Title 21, Section 174" cannot be deemed to charge that petitioner knew that the narcotics were imported "contrary to law". The indictment, however, charged that petitioner sold heroin which, under 21 U.S.C. 173, *supra*, must have been illegally imported, either in itself or because the materials for its manufacture were unlawfully imported. Since 21 U.S.C. 174 makes it illegal to sell any narcotic drug, knowing the same to have been illegally imported, the indictment did charge petitioner with knowledge that the heroin was imported "contrary to law." An indictment is not required to use the specific wording of the statute, as long as it adequately gives the defendant notice of the crime with which he is charged. The indictment here plainly satisfied that standard.

This Court said long ago, in *Hagner* v. *United States*, 285 U.S. 427, 433, that "Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment". That test is more than adequately met here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MALCOLM R. WILKEY,
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BEATRICE ROSENBERG,
Attorney.

FEBRUARY 1960.

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 626

PETITIONER'S REPLY BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 626

LOUIS FIANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

Respondent argues in its opposing brief that the omission in the indictment is cured by virtue of inferential incorporation in the indictment of the provisions of a section of the United States Code not referred to in either the indictment or the section on which the indictment was based. Respondent further contends that in any event the error was not substantial and should be disregarded. On both points, the cases specifically hold against respondent.

The Presence of the Word *Heroin* in the Indictment Does Not Remedy the Omission of an Element of the Offense in the Indictment.

The Government, by its failure to discuss the point, apparently concedes petitioner's argument that the citation of Section 174 in the body of the indictment

is a nullity insofar as it purports to be an allegation of an element of the offense. The Government then seeks to remedy the consequent omission by relying on the presence of the word *heroin* in the indictment.

It has long been the law that an element of an offense must be charged directly and not by inferential incorporation by reference.[1] Indeed, the means suggested by the Government to remedy its error only serves to emphasize the departure from the accepted and usual course of judicial proceedings necessary to uphold this indictment.

The attention of the Court is directed to *United States* v. *Calhoun*, 257 F. 2d 673 (7th Cir. 1958) and *Robinson* v. *United States*, 263 F. 2d 911 (10th Cir. 1959).[2] In both cases the narcotic drug involved was heroin, and the word *heroin* appeared in the indictments. Nevertheless, failure to properly allege that the defendants knew that the heroin had been imported contrary to law required reversals of the convictions, for the reason that an element of the offense was not alleged.

Were the Government view to be adopted, the words of Section 174, "knowing the same to have been imported or brought into the United States contrary to law, . . . ", would be necessarily reduced to mere surplusage in any case involving heroin. The Government obviously cannot thus vitiate an element of an offense specifically required by Congress. Indeed, to permit such interpretation would raise serious consti-

[1] See the discussion of *United States* v. *Hess*, 124 U. S. 483, on pages 7-8 of the petition.

[2] Both cases were cited on page 10, footnote 8, of the petition.

tutional questions, since the element of unlawful importation into the United States is probably the sole basis for federal jurisdiction.

The Error is Substantial and Cannot Be Disregarded

The Government relies heavily on a general quotation from *Hagner* v. *United States*, 285 U. S. 427. In the case at bar we are dealing with the complete omission of an element of the offense. In the *Hagner* case all of the elements were alleged and a mere question of particularity was in issue. In addition to the excerpt cited by respondent, however, the Court also said,

> "The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, *but whether it contains the elements of the offense intended to be charged*, . . . " (at page 431) (Italics added)

This language was restated in *United States* v. *Debrow*, 346 U. S. 374.[3]

The Courts have clearly held that failure to allege an element of an offense is substantial error and cannot be disregarded. In *United States* v. *Calhoun*, *supra*, the Court stated,

> "The core of this reversible error is the omission, not the class of omission. U. S. Const. Amend. VI. Rule 7, Federal Rules of Criminal Procedure, 18 U. S. C. is unavailing in this situation and the failure to challenge the indictment at the trial level is unimportant, on this record, because count 5 omitted an element of the offense. Rule 12 (b) (2), Federal Rules of Criminal Procedure,

[3] This case was cited on page 5 of the petition.

18 U. S. C. We are reluctant to reverse a judgment on account of this defect, but it must be done where there is more than an obvious technicality, and one which cannot be disregarded under Rule 52 (a), Federal Rules of Criminal Procedure, 18 U. S. C., as a 'harmless error'. *United States* v. *Mannszak*, 3 Cir., 1956, 234 F. 2d 421." (at page 680)

See also *Robinson* v. *United States*, *supra*.

Conclusion

The mere presence of the word *heroin* in the indictment does not constitute an allegation that the defendant knew that the narcotics were imported contrary to law. The indictment fails to charge an offense by virtue of its failure to charge an element thereof. Failure to charge an offense is substantial error that cannot be disregarded, although not raised at the trial. The sufficiency of this indictment presents an important question in the administration of federal criminal law. We submit that the writ should be granted.

Respectfully submitted,

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February 4, 1960

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 626

LOUIS FIANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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LOUIS FIANO,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

Petitioner presents his petition for a rehearing of this Court's order dated February 23, 1960, denying the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, and, in support thereof, respectfully shows:

Grounds for Rehearing

Subsequent to the filing of the petition herein, this Court decided *Stirone v. United States.*[1] Petitioner submits that this decision constitutes an intervening circumstance of controlling effect such that a petition for rehearing should be granted.

---

[1] *Nicholas A. Stirone, Petitioner* v. *United States*, No. 35, October Term, 1959, decided January 11, 1960.

The indictment herein charged in part that the narcotic drug

> "had been imported into the United States of America contrary to United States Code, Title 21, Section 174".[2]

The trial judge charged the jury with regard to the above clause as follows:

> "The narcotic drug must have been imported into the United States contrary to law. . . ." (R p. 312)[3]

To permit a trial judge to thus broaden the grand jury's charge was specifically disapproved by this Court in the *Stirone* case.[4] Mr. Justice Black stated,

> "Ever since Ex parte Bain, 121 U. S. 1, was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself . . . . Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same."

The Court proceeds to explain at length that such a variance unequivocally constitutes a substantial deprivation of a defendant's rights and cannot be disregarded.

We do not know what, if any, evidence was presented to the grand jury regarding unlawful im-

[2] The indictment is set forth at length as Appendix E to the petition.

[3] Reference to the Transcript of Record is designated "R".

[4] That the citation of the section by number in the indictment does not constitute a charge that the narcotics were unlawfully imported has been demonstrated at length in the petition and reply brief.

portation. Perhaps lack of any such evidence, or insufficient evidence, accounts for the failure of the grand jury to charge unlawful importation.

It must be pointed out that the presumption contained in the statute concerns only proof at the trial and not the requirements of the indictment. Any suggestion that the grand jury need not concern itself with evidence of unlawful importation alone presents an issue of such importance that it should be decided by this Court.

The opinion in the Stirone case concludes by specifically disapproving a trial court's supplying charges not made by the grand jury for reasons known only to itself.

Conclusion

The *Stirone* case constitutes a recent specific rejection by this Court of the technique applied in the case at bar. Considering also the petition and reply brief previously filed herein, this case presents important issues which should be decided by this Court. For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

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March 7, 1960

Certificate of Counsel

I, L. DONALD JAFFIN, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

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Counsel for Petitioner